NO. 46026-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

MICHAEL REUBEN HORST, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-01424-6

BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

ANNE M. CRUSER, WSBA #27944
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

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A. RESPONSE TO ASSIGNMENT OF ERROR

I. HORST DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY ELECTED NOT TO BRING A FRUITLESS MOTION FOR A MISTRIAL.

B. STATEMENT OF THE CASE

Kayla Horst married the defendant when she was about seventeen years old. RP 102-03. After they were married, they had a child. RP 103. The marriage became rocky within a few months, and Kayla and the defendant ultimately separated a little over a year after they were married. RP 103-106. Kayla occasionally would continue to stay with the defendant after the separation because she had no place to go and little family support. RP 106-07. Following their separation, they were not intimate. RP 106-07. The defendant would occasionally ask Kayla to have sex and she consistently said no. RP 106-07. Kayla did not have her own car, but the defendant would occasionally let her use his car. RP 107. He would also drive her places from time to time. RP 107.

On the evening of July 26, 2013, Kayla had plans to go out with her friend, Marissa, but those plans got canceled. RP 108. The defendant was already driving Kayla to Marissa's house when the plans got canceled, so the defendant suggested they hang out together. RP 108. The boy Kayla was dating at that time was out of town, and she had nothing

else to do, so she agreed to hang out with the defendant. RP 109. The defendant took Kayla to his mother's house. RP 109. There, they visited with the defendant's mother, his nieces, his brother, and his mother's boyfriend. RP 110. They mainly watched television. RP 110. Eventually, the nieces went home, and the mother, her boyfriend, and the defendant's brother went to sleep. RP 11. Kayla and the defendant were positioned on opposite ends of the couch, and her feet were in his lap. RP 111-12. During that time, the defendant texted Kayla's phone and asked if she wanted to have sex. RP 112. She told him "no." RP 112. He persisted in asking her, and each time she answered "no," that she didn't want to. RP 112. She eventually fell asleep. RP 112. She was wearing pajama shorts and a tank top. RP 113.

She awoke to a tickling sensation on her inner thighs. RP 113. She rubbed her leg, thinking it might be a fly, and went back to sleep. RP 113. She awoke a second time to find the defendant digitally penetrating her with his fingers. RP 113. He had moved her shorts and underwear aside. RP 113. She turned her body away from him hoping he would stop, which he did. RP 113. She fell back asleep. RP 113. She awoke a third time to find the defendant having penile intercourse with her. RP 114-16. Kayla was scared and did not know what to do, so she lay there silently until he finished. RP 114-16. She was shocked and felt violated. RP 116-17. The

defendant had never disregarded her wishes before and commenced intercourse with her while asleep and without her permission. RP 115. After the defendant finished, he cleaned up and sat down again like nothing had happened. RP 117.

Kayla had no way to get home except for the defendant. RP 117, 119. She asked him to go get some food in the hope she could get away from him. RP 117. While the defendant was gone, Kayla woke up his brother, Nathan, and told him that the defendant raped her. RP 118. She was crying hysterically at that point. RP 118. As she was telling Nathan, the defendant came back and realized she was telling Nathan about the rape. RP 118. She yelled at him to stay away from her. RP 118. Kayla initially decided to walk home, but the defendant told her to get into his car. RP 119. She relented. RP 119. During the ride, the defendant asked her what was wrong and tried to touch her leg, but she curled up against the passenger door and told him not to touch her. RP 119. Kayla eventually demanded that the defendant stop the car and let her out before they reached her home, because she could not stand to be in the car with him. RP 119.

Kayla ended up at a gas station on Highway 99 in Vancouver. RP 120. After leaving Kayla, the defendant "blew up" her phone by calling and texting her repeatedly. RP 120. A number of the text messages were

admitted as evidence. The defendant admitted in one of the text messages that "I don't know why I did it. I just didn't have for a long time, so my body wanted it. I'm so sorry. I didn't want to have sex with you because you said no. I got it. What are you going to do to me? Are you going to call the cops on me?" RP 127. Another text said "I want us friends and I don't want anyone to know about this, please, because if you tell people I will just lie about it." RP 127. A later text said "This will never happen again, I promise. Please answer me." RP 128.

From the gas station, Kayla called her friend, Bailey Karpa. RP 130. Bailey eventually drove Kayla to the police department. RP 131. Officer White of the Vancouver Police Department interviewed Kayla at the West Precinct. RP 72. Bailey was with her. RP 72. Kayla was distraught and crying. RP 72. Following his interview with Kayla, Officer White contacted the defendant. RP 71. The defendant looked as though he just woke up. RP 71. When asked if he knew why Officer White was there, the defendant replied that it had something to do with Kayla. RP 71.

At trial, Officer White was the first witness. During cross examination, he was asked whether Bailey Karpa had told him "whose idea it was to come to the police?" RP 86. Officer White replied that Bailey told him that she, Bailey, told Kayla "You need to go to the police." RP 86.

Bailey Karpa was the second witness to testify. She was asked to describe the excited utterances Kayla made to her, and described Kayla as scared, pale, wide-eyed, and shaking, like she'd seen a ghost. RP 91. Bailey was asked "[D]id you try figuring out what was going on?" RP 92. Bailey answered "yes," and added that she "encouraged her to go to the police." RP 92. The prosecutor followed up on her statement by asking "[D]o you have a horse in this race?" RP 93. Bailey misunderstood the colloquialism, and answered "I took her to the police station." RP 93. The prosecutor followed up by asking, "[D]id you have any vested interest in her calling the police or anything against the Defendant on why you would encourage her to call the police?" Bailey answered, "No." RP 93. Why then, she was asked, did she encourage Kayla to go to the police? Bailey gave a largely non-responsive answer:

> Because I--I feel like, you know, that's--that's--that's a pretty--that's a pretty big claim to make against somebody and you know, I--if it really happened--if it did--if it didn't actually happen, I don't think she would have gone to the police, you know? Like it--it really seemed like she really, really meant everything she had said.

RP 93.

The judge immediately interrupted the examination and issued a curative instruction sua sponte. The judge said:

> I--I'm going to direct the jury to disregard any interpretation of the witness as to believability or what

> another person may have meant, or the believability of another witness who is scheduled to testify here, so the jury will disregard that.

RP 93-94.

Defense counsel thanked the judge for issuing the curative instruction. RP 93. The judge also immediately admonished the witness to listen carefully to the question and answer only the question asked. RP 94.

The jury returned a verdict of guilty to the charge of rape in the second degree. CP 38. This timely appeal followed. CP 91-92.

C. ARGUMENT

I. HORST DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY ELECTED NOT TO BRING A FRUITLESS MOTION FOR A MISTRIAL.

Horst's sole assignment of error in this appeal is that his counsel was ineffective for failing to move for a mistrial in response to Bailey Karpa's statement that she did not believe a person would make a report to the police about a crime unless the crime actually happened, and that it appeared to her that Kayla meant what she was saying. Horst's claim lacks merit.

There is a strong presumption of effective representation of counsel, and the defendant has the burden to show that based on the record, there are no legitimate strategic or tactical reasons for the

challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001) (*quoting State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)).

As the Supreme Court explained in *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984):

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland at 689.

But even deficient performance by counsel "does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland* at 691. A defendant must affirmatively prove prejudice, not simply show that "the errors had some conceivable effect on the outcome." *Strickland* at 693. "In doing so, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *State v. Crawford*, 159 Wn.2d 86, 99-100,

147 P.3d 1288 (2006) (*quoting Strickland* at 694). When trial counsel's actions involve matters of trial tactics, the Appellate Court hesitates to find ineffective assistance of counsel. *State v. Jones*, 33 Wn.App. 865, 872, 658 P.2d 1262, review denied, 99 Wn.2d 1013 (1983). And the court presumes that counsel's performance was reasonable. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). "The decision of when or whether to object is a classic example of trial tactics." *State v. Madison*, 53 Wn.App. 754, 763, 770 P.2d 662, *review denied*, 113 Wn.2d 1002, 777 P.2d 1050 (1989). Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal. *Madison* at 763; *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). This court presumes that the failure to object was the product of legitimate trial strategy or tactics, and the onus is on the defendant to rebut this presumption. *In re Personal Restraint of Davis*, 152 Wn.2d, 647, 714, 101 P.3d 1 (2004) (quoting *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002)). Further, "[t]he absence of an objection by defense counsel strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." *State v. Edvalds*, 157 Wn.App. 517, 525-26, 237 P.3d 368 (2010), citing *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). "Counsel may not remain silent, speculating upon a

favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or an appeal." *Swan* at 661, quoting *Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960).

In order to demonstrate ineffective assistance of counsel on a claim that defense counsel should have brought a motion for a mistrial and failed to do so, Horst must show that the proceedings would have been different if the motion was brought. In other words, he must show that the motion would have been granted in order to show that counsel's performance was deficient and that he was prejudiced by the deficiency. *McFarland*, supra, at 337. Here, Horst has not shown that the motion would have, or should have, been granted. Although it is, of course, improper for a witness to offer an opinion on the credibility of another witness, such testimony can be cured by a curative instruction and a mistrial is not automatically required.

In *State v. Perez-Valdez*, the Supreme Court affirmed the trial court's ruling denying a motion for a mistrial when a State's witness offered an opinion that the victims in the case were being truthful. *State v. Perez-Valdez*, 172 Wn.2d 808, 817-18, 265 P.3d 853 (2011). In that case, defense counsel objected and the trial court immediately instructed the jury to disregard the remark. *Perez-Valdez* at 818. Because the issue had been preserved by counsel's objection, and was therefore not being argued

through the back door of ineffective assistance of counsel as in this case, the Supreme Court reviewed de novo whether the statement by the witness was so egregious that it necessitated a mistrial. *Id.* The Court looked to three factors to determine whether the trial irregularity warranted a new trial: "(1) the seriousness of the irregularity; (2) whether the statement was cumulative of evidence properly admitted; and (3) whether the irregularity could be cured by an instruction." *Perez-Valdez* at 818, quoting *State v. Post*, 118 Wn.2d 596, 620, 826 P.2d 172, 837 P.2d 599 (1992). The Court found that the trial court did not abuse its discretion in denying the motion for a mistrial, reiterating

> "'the oft repeated observation that the trial judge,' having 'seen and heard' the proceedings, 'is in a better position to evaluate and adjudge than can we from a cold, printed record.'" *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting *State v. Wilson*, 71 Wn.2d 895, 899, 431 P.2d 221 (1967)).

Perez-Valdez at 819.

Here, where no motion was made, defense counsel was in the best position to evaluate the prejudicial effect of the witness' remark, and was obviously satisfied with the court's stern curative instruction. The remark at issue was of minor moment in the overall trial, and it was arguably invited by defense counsel's insinuation, during Officer White's testimony, that perhaps Bailey had pressured Kayla into making a report

of rape that was actually untrue. Horst's theory at trial was that Kayla must have realized that word would get out that she spent the night at her mother-in-law's house, and she decided to fabricate a claim of rape because it would somehow get her out of trouble with her current boyfriend for having been at the house in the first place. The jury rejected Horst's theory and had ample other evidence upon which to do so. Kayla's actions and demeanor, as testified to by Officer White, Bailey Karpa, and Kayla herself, as well as Horst's confessional text messages, are entirely inconsistent with a fabricated claim of rape.

Moreover, trial counsel's decision was a reasonable tactic if he believed that a second trial was not in his client's best interest. We are unable to discern, from a transcript, how a witness presents herself at trial. Perhaps Kayla Horst did not present particularly well. Perhaps trial counsel thought the jury would find it bizarre that when Kayla awoke to the defendant digitally penetrating her without her consent or prior knowledge, her response was to simply reposition her body and fall back asleep. Perhaps counsel felt the trial was going well for his client and believed an acquittal was a likely outcome. That the defendant was ultimately convicted does not negate the reasonableness of these difficult tactical calculations. "Criminal defendants are not guaranteed 'successful assistance of counsel.'" *State v. Dow*, 162 Wn.App. 324, 336, 253 P.3d

476 (2011), quoting *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978) and *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). Not every error made by defense counsel that results in adverse consequences is prejudicial under *Strickland*, supra. *State v. Grier*, 171 Wn.2d 17, 43, 246 P.3d 1260 (2011). Whether a "strategy ultimately proved unsuccessful is immaterial." *Grier* at 43, see also *Dow*, supra, at 336. Last, with respect to the deficient performance prong of *Strickland*, "hindsight has no place in an ineffective assistance analysis." *Grier* at 43.

Horst has not shown either deficient performance or prejudice. His conviction should be affirmed.

D. CONCLUSION

Horst's conviction should be affirmed.

DATED this 26th day of November, 2014.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: _____
ANNE M. CRUSER, WSBA #27944
Deputy Prosecuting Attorney

CLARK COUNTY PROSECUTOR

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